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**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

In re:

PG&E CORPORATION,

-and-

**PACIFIC GAS AND ELECTRIC
COMPANY,**

Debtors.

- ☐ Affects PG&E Corporation
☐ Affects Pacific Gas and Electric Company
☒ Affects both Debtors

** All papers shall be filed in the lead case,
No. 19-30088 (DM)*

Chapter 11

Bankr. Case No. 19-30088 (DM)

(Jointly Administered)

**MEMORANDUM OF POINTS AND
AUTHORITIES AND LIMITED
OBJECTION WITH REGARD TO THE
ENTRY OF A PROTECTIVE ORDER**

Hearing Date: June 26, 2019

Hearing Time: 9:30 a.m. (Pacific Time)

Hearing Location: United States

**Bankruptcy Court, Courtroom 17, 16th
Floor, San Francisco, CA 94102**

Judge: Hon. Dennis Montali

**Objection Deadline: June 19, 2019, 4:00
p.m. (Pacific Time)**

1 **TABLE OF CONTENTS**

2 TABLE OF AUTHORITIESii

3 PRELIMINARY STATEMENT 1

4 BACKGROUND 3

5 A. Disputed Terms In The Proposed Protective Orders. 3

6 B. Additional Important Provisions Of The Proposed Protective Orders. 3

7 ARGUMENT 5

8 I. THE BURDEN OF BRINGING A MOTION SHOULD FALL ON THE PARTY

9 CLAIMING CONFIDENTIALITY. 5

10 II. EACH OF THE PROPOSED PROTECTIVE ORDERS CREATES THE RISK OF

11 OVERLY RESTRICTIVE DESIGNATIONS. 6

12 A. Parties That Sign the Acknowledgment Should Not Be Required to Obtain Producing

13 Party Consent. 6

14 B. Certain Protective Order Provisions May Lend Themselves to Abuse. 7

15 CONCLUSION..... 8

16

17

18

19

20

21

22

23

24

25

26

27

28

TABLE OF AUTHORITIES

Cases

Page(s)

Brewer v. Gen. Nutrition Corp.,
No. 11-CV-3587 (YGR), 2014 WL 5873328 (N.D. Cal. Nov. 12, 2014)6

In re Crawford,
194 F.3d 954 (9th Cir. 1999)6

Statutes

11 U.S.C. § 107(a).....5

1 The Ad Hoc Subrogation Group of subrogation claim holders (the “Ad Hoc Subrogation
2 Group”) in the above-captioned chapter 11 cases of PG&E Corporation and Pacific Gas and Electric
3 Company (together, the “Debtors”), by its attorneys Willkie Farr & Gallagher LLP and Diemer &
4 Wei, LLP, hereby submits, pursuant to 11 U.S.C. § 1109(b), this memorandum of points and
5 authorities and limited objection with regard to the *Motion of the Official Committee of Tort Claimants*
6 *for Entry of a Protective Order*, filed by the Official Committee of Tort Claimants (the “TCC”) on
7 June 5, 2019 (the “TCC Motion”), and the *Motion for Entry of Protective Order Pursuant to Fed. R.*
8 *Bankr. P. 7026 and 11 U.S.C. § 105(a) Governing Discovery Materials and Other Information*, filed
9 by the Debtors on June 7, 2019 (the “Debtors’ Motion”).

10 **PRELIMINARY STATEMENT**

11 1. It is anticipated that the Debtors will produce substantial discovery in these Chapter 11
12 cases related to a variety of issues, most significantly their liability for various wildfires in 2017 and
13 2018. The Ad Hoc Subrogation Group, whose members hold, or act as investment advisors or
14 managers to funds and/or accounts or their respective subsidiaries that hold, billions of dollars in
15 claims related to those wildfires on account of payments that have been made or will be made to
16 insured parties, joins in the TCC Motion with respect to the proposed protective orders, except to the
17 extent specified below. The Debtors’ proposed protective order improperly seeks to shift the burden
18 from the Producing Party¹ to third parties, including the Ad Hoc Subrogation Group and the TCC, to
19 challenge improper confidentiality designations made by the Debtors. And, even more importantly,
20 the Debtors seek to shift the burden of proving that any such confidentiality designations are
21 unwarranted to other parties.

22 2. The Debtors’ position is based exclusively on the argument that filing motions to
23 maintain confidentiality designations will place an undue burden on them given the volume of
24 documents they will be producing. However, their position is inconsistent with both the law and
25 practice in this District. Moreover, even if the Court accepts the Debtors’ “burden” argument as to
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27 ¹ Capitalized terms not otherwise defined have the definition ascribed to them in the proposed protective orders.
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1 the *filing* of a motion to maintain a confidentiality designation, they offer no rationale for why the
2 *burden of proof* should be shifted to other parties. Nor can they. Under applicable law, the Producing
3 Party – which is the party seeking to evade the well-established public right of access to documents
4 filed with the Court – bears the burden of demonstrating that materials warrant confidential treatment.
5 The fact that the Debtors have volumes of documents to produce does not, and should not, change the
6 law.

7 3. The Ad Hoc Subrogation Group also files this submission to alert the Court to various
8 provisions in both proposed protective orders that could lend themselves to abuse, and in the process
9 disproportionately harm the Ad Hoc Subrogation Group. The Ad Hoc Subrogation Group is
10 comprised of dozens of parties who hold (or act as investment advisors or managers to funds and/or
11 accounts or their respective subsidiaries that hold) claims against the Debtors, including many
12 insurance companies whose insureds owned property that suffered damages as a result of the 2017
13 North Bay Fires and the 2018 Camp Fire. The members of the Ad Hoc Subrogation Group have a
14 large economic interest in these bankruptcy cases – holding claims worth billions of dollars – and will
15 be active participants in all aspects of discovery.

16 4. The Ad Hoc Subrogation Group objects to one provision of both proposed protective
17 orders. As written, both contain a section (Section 7.3(j) in the TCC’s proposed protective order, and
18 Section 7.3(k) in the Debtors’ proposed protective order) providing that persons or entities not
19 otherwise specified in the proposed protective orders can gain access to confidential material by
20 endorsing an agreement to be bound by the terms of the protective order. However, both proposed
21 protective orders require that the Producing Party provide consent. This consent requirement is
22 unreasonable and burdensome, and thus should be stricken.

23 5. The Ad Hoc Subrogation Group has no further objections at this time, and believes
24 that, subject to the change discussed above, the TCC’s proposed protective order may be entered.
25 However, certain of the provisions in both proposed protective orders create the potential for
26 confidentiality over-designation, which could restrict the ability of the Ad Hoc Subrogation Group’s
27 members to view materials and unfairly restrict their participation in these cases. If a plan of
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1 reorganization is going to be efficiently negotiated, it is essential that the members of the Ad Hoc
2 Subrogation Group – which effectively constitutes one of the largest organized groups of claimants in
3 these cases – receive unfettered access to discovery so that they can analyze the Debtors’ liability for
4 wildfire claims, among other issues. While the Ad Hoc Subrogation Group does not seek relief from
5 the Court in connection with these issues now, it believes it necessary to alert the Court to these
6 provisions before significant discovery begins.

7 **BACKGROUND**

8 **A. Disputed Terms In The Proposed Protective Orders.**

9 6. The TCC Motion and the Debtors’ Motion present a dispute over three aspects of the
10 proposed protective orders: (1) the proper procedure if parties reach an impasse over the designation
11 of discovery material (the TCC proposal requires the party making a confidentiality designation (the
12 “Designating Party”) to move before this Court to preserve the designation, while the Debtors’
13 proposal places the onus on the party challenging a confidentiality designation); (2) which party
14 should bear the burden of persuasion, should a challenge to designation be brought before this Court
15 (the TCC’s proposal maintains the default rule under the law that the Designating Party bears the
16 burden of demonstrating that the confidentiality designation is accurate, whereas the Debtors propose
17 to shift that burden to the challenging party), and (3) the question of whether a party can waive a
18 confidentiality designation (TCC proposes that if a Designating Party does not make a motion to
19 preserve a designation within ten (10) days of receiving a challenge to its confidentiality designation,
20 it waives the designation).

21 **B. Additional Important Provisions Of The Proposed Protective Orders.**

22 7. Both protective orders submitted to the Court propose to govern the production of all
23 material “exchanged in or subject to discovery that is produced, formally or informally in response to
24 or in connection with any Discovery Requests” in the Chapter 11 Cases. (TCC Motion Ex. A § 3;
25 Debtors’ Motion § 3.) Both proposed protective orders also contain a “use restriction,” which
26 provides:
27
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1 Discovery Material produced informally by the Debtors in connection with the Chapter
2 11 Cases or pursuant to Rule 2004 (unless otherwise agreed by the Debtors) may only
3 be used in the Chapter 11 Cases, including in connection with any contested motions in
4 the Chapter 11 Cases, and may not be used in connection with any adversary proceeding
5 or other litigation.

6 (TCC Motion Ex A. §§ 3, 7.1; Debtors' Motion Ex. A §§ 3, 7.1.)

7 8. A party seeking to designate material as confidential under the terms of the proposed
8 protective orders may designate the materials under one of three classifications: "Confidential,"
9 "Highly Confidential / Professional Eyes Only" or "Contractor Confidential." (TCC Motion Ex. A §
10 5.1; Debtors' Motion Ex. A § 5.1.) The classification of "Highly Confidential" or "Professional Eyes
11 Only" applies if the party producing the material:

12 believes in good faith (or with respect to documents received from another person, has
13 been reasonably advised by such other person) that such Discovery Material constitutes
14 or includes "HIGHLY CONFIDENTIAL" and/or "PROFESSIONAL EYES ONLY"
15 Material that is of such a nature that a risk of competitive injury or a material risk to the
16 Debtors' development of a plan of reorganization or emergence from Bankruptcy would
17 be created if such Discovery Material were disclosed to persons other than those
18 identified in Paragraph 7.3 of this Order, such as trade secrets, sensitive financial,
19 personal or business information, including insurance policy information, or material
20 prepared by its industry advisors, financial advisors, accounting advisors, experts or
21 consultants (and their respective staff) that are retained by any Party in connection with
22 these Chapter 11 Cases, and only to the extent that the Producing Party believes in good
23 faith that such material is of such a nature that Highly Confidential or Professional Eyes
24 Only treatment is warranted.

25 (TCC Motion Ex. A § 5.3; Debtors' Motion Ex. A § 5.3.) Among the parties identified in both the
26 TCC and the Debtors' proposed Section 7.3 who can receive all discovery materials, including
27 "Professional Eyes Only" materials, are "Outside Counsel," a defined term that includes:

28 attorneys who are not employees of a Party but are retained to represent or advise a Party
regarding the Chapter 11 cases. With respect to the Debtors, and any Official
Committee, Outside Counsel refers to counsel that has been retained by one of the above
Parties and whose retention has been approved by the Court.

(TCC Motion Ex. A § 2.6; Debtors' Motion Ex. A § 2.6.) The proposed protective orders also provide
that access to confidential material may be granted to "any other person or entity with respect to whom
the Producing Party may consent in writing and who have signed the 'Acknowledgment and

1 Agreement to Be Bound,” which is Exhibit A to the proposed protective orders. (*Id.* Ex A. § 7.3(j);
2 Debtors’ Motion Ex. A § 7.3(k).)

3 **ARGUMENT**

4 **I. THE BURDEN OF BRINGING A MOTION SHOULD FALL ON THE PARTY** 5 **CLAIMING CONFIDENTIALITY.**

6 9. The Ad Hoc Subrogation Group supports the TCC’s position that, in the event a dispute
7 over a confidentiality designation arises, the Designating Party, and not the party seeking to contest
8 the designation, should bear the burden of bringing the matter before this Court. First, as the TCC
9 points out, such a procedure is consistent with this Court’s customary practice and the standard form
10 protective order in this district, as well as applicable law. (TCC Motion at 5.) Second, placing the
11 onus on the Designating Party to preserve its designation would encourage Producing Parties to only
12 designate material as confidential when they are confident that such designations are appropriate –
13 rather than over-designating large document productions and waiting to see what materials other
14 parties will bother to challenge.

15 10. Finally, the Debtors’ sole argument in favor of this aspect of their proposed protective
16 order is that that it would be unduly burdensome for the Debtors – who will be producing the majority
17 of the discovery materials in these cases – to bear the burden of moving to seal in the face of a
18 challenge by any party to a confidentiality designation, no matter how insubstantial the objection.
19 Even if the Court were to agree with that position, the Debtors offer no explanation why the
20 challenging party should also bear the burden of persuasion on that motion.

21 11. Nor is there any basis for that position. Disputes over confidentiality designations are
22 most likely to arise in connection with materials that will be appended to motions or otherwise publicly
23 filed. If the material is properly designated “Confidential” or “Highly Confidential” it will be filed
24 under seal; if not, it will be made public. The law is clear that the public has a general right of access
25 to documents filed in these proceedings. 11 U.S.C. § 107(a) (“Except as provided in subsections (b)
26 and (c) and subject to section 112, a paper filed in a case under this title and the dockets of a bankruptcy
27 court are public records and open to examination by an entity at reasonable times without charge”);
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1 *In re Crawford*, 194 F.3d 954, 960 n.8 (9th Cir. 1999) (exceptions to § 107 “are construed narrowly”
2 and the section has an “otherwise broad scope”). As a result, the burden of proving that material
3 designated confidential “is in fact sealable . . . lays squarely on the party who designated it
4 confidential. . . .” *Brewer v. Gen. Nutrition Corp.*, No. 11-CV-3587 (YGR), 2014 WL 5873328, at
5 *1 (N.D. Cal. Nov. 12, 2014) (internal quotations omitted). The volume of discovery the Debtors
6 anticipate producing in these cases does not and should not relieve them of that burden under the law.

7 **II. EACH OF THE PROPOSED PROTECTIVE ORDERS CREATES THE RISK**
8 **OF OVERLY RESTRICTIVE DESIGNATIONS.**

9 **A. Parties That Sign the Acknowledgment Should Not Be Required to Obtain Producing**
10 **Party Consent.**

11 12. The Ad Hoc Subrogation has only one objection to both proposed protective orders.
12 Section 7.3(j) of the TCC’s proposed protective order and Section 7.3(k) of the Debtors’ proposed
13 protective order provide that persons or entities not otherwise permitted to access “Confidential” or
14 “Highly Confidential” material may gain access those materials provided (i) they endorse the
15 “Acknowledgment and Agreement to Be Bound” and (ii) the Producing Party consents. (TCC Motion
16 Ex. A §§ 7.2(f), 7.3(j); Debtors’ Motion Ex. A §§ 7.2(f); 7.3(k).) For counsel, signing the
17 “Acknowledgment” is only necessary if they do not meet the definition of “Outside Counsel,” (TCC
18 Motion Ex. A §§ 7.2, 7.3; Debtors’ Motion Ex. A §§ 7.2; 7.3), which the proposed protective orders
19 define as “attorneys who are not employees of a Party but are retained to represent or advise a Party
20 regarding the Chapter 11 cases.”² (TCC Motion Ex A. § 2.6; Debtors’ Motion Ex. A § 2.6.)

21 13. The Ad Hoc Subrogation Group is concerned that a party could take the position that
22 “Outside Counsel” would not include counsel who represent one or more members of the Ad Hoc
23 Subrogation Group, but who have not made an appearance in these cases. To the extent such counsel
24 wish to gain access to materials produced pursuant to the protective order, they should be permitted
25 to do so without being forced to get consent from each Producing Party on a production-by-production
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27 ² The proposed protective orders also utilize the phrase “Outside Counsel of Record,” (TCC Motion Ex. A §§
28 2.2, 2.5; Debtors’ Motion Ex. A §§ 2.2; 2.5), which is not a defined term, despite being capitalized.

1 basis. Requiring counsel to obtain that consent would be inefficient, costly, cause delays and increase
2 the likelihood of parties seeking Court intervention. Accordingly, the Ad Hoc Subrogation Group
3 requests that the requirement in the proposed protective orders that Producing Party consent to each
4 party who signs the “Acknowledgment and Agreement to Be Bound” be stricken.

5 **B. Certain Protective Order Provisions May Lend Themselves to Abuse.**

6 14. While the Ad Hoc Subrogation Group does not object to any other portions of the
7 proposed protective orders at this time, several provisions nevertheless raise concerns that they could
8 overly restrict the ability of the Ad Hoc Subrogation Group to use discovery materials, if designations
9 are broadly or improperly applied to discovery materials.

10 15. *First*, both of the proposed protective orders permit certain materials to be designated
11 “Highly Confidential” or “Professional Eyes Only.” (TCC Motion Ex. A § 5.3; Debtors’ Motion Ex.
12 A §5.3.) Those materials can only be viewed by the narrow categories of individuals identified in
13 Sections 7.3, which is generally limited to outside counsel, financial advisors, this Court and certain
14 witnesses. (TCC Motion Ex. A §§ 5.3, 7.3; Debtors’ Motion Ex. A §§ 5.3, 7.3.) Most significantly,
15 the proposed protective orders prohibit any client representatives – including officers, directors,
16 employees or “In House Counsel” – from viewing such materials. At the same time, the definition of
17 “Professional Eyes Only” materials under both protective orders includes various loose and vague
18 categories that have no obvious sensitivity, such as “insurance policy information,” or materials
19 prepared by “industry advisors, financial advisors, accounting advisors, experts or consultants.” (TCC
20 Motion Ex. A § 5.3; Debtors’ Motion Ex. A § 5.3.) The proposed protective orders provide only one
21 meaningful check on “Professional Eyes Only” designations – the Designating Party must believe “in
22 good faith” that disclosure of the material outside of the authorized individuals creates “a risk of
23 competitive injury or a material risk to the Debtors’ development of a plan of reorganization or
24 emergence from Bankruptcy.” (TCC Motion Ex. A § 5.3; Debtors’ Motion Ex. A § 5.3.)

25 16. The members of the Ad Hoc Subrogation Group are actively involved in these cases,
26 and it is essential that their in-house legal advisors and business teams fully understand the information
27 produced during discovery. Among other things, this will allow them to assess and quantify their
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1 claims against the Debtors, and participate meaningfully in discussions relating to a plan of
2 reorganization. Moreover, any abuse of the “Professional Eyes Only” designation poses a greater
3 threat of harm to the Ad Hoc Subrogation Group than other significant creditor constituencies in these
4 cases, such as the UCC or TCC, who represent parties that do not participate in the day-to-day
5 management of these cases.

6 17. The Ad Hoc Subrogation Group understands that there may be an extremely limited
7 universe of highly confidential business records that, if broadly disclosed beyond professionals, could
8 potentially harm the Debtors. However, to the extent that the Debtors (or any Producing Party)
9 designate materials “Highly Confidential” or “Professional Eyes Only” and do not comply with the
10 stringent requirement that “the Producing Party believes in good faith that such material is of such a
11 nature that Highly Confidential or Professional Eyes Only treatment is warranted,” (TCC Motion Ex
12 A § 5.3; Debtors’ Motion Ex A § 5.3), the Ad Hoc Subrogation Group intends to promptly raise that
13 issue with the Court.

14 18. *Second*, the proposed protective orders provide that materials “produced informally by
15 the Debtors . . . may only be used in the Chapter 11 Cases, including in connection with any contested
16 motions in the Chapter 11 Cases, and may not be used in connection with any adversary proceeding
17 or other litigation.” (TCC Motion §§ 3, 7.1; Debtors’ Motion §§ 3, 7.1.) All parties expect that these
18 cases will involve significant litigation. As this Court is aware, a number of parties, including
19 members of the Ad Hoc Subrogation Group, have brought claims against the Debtors both in and
20 outside of these proceedings. Prohibiting parties who obtain documents in one aspect of these cases
21 from using them, for example, in a related adversary proceeding, is unreasonable and will lead to
22 duplicative and wasteful discovery requests, consuming valuable time and resources. The Ad Hoc
23 Subrogation Group trusts that if litigation does move forward and documents obtained in these
24 proceedings are relevant to any those proceedings, the Debtors will agree to appropriate relief from
25 any protective order to permit the efficient use of relevant discovery materials.

26 **CONCLUSION**

27 19. For all the foregoing reasons, the Ad Hoc Subrogation Group urges the Court to adopt
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1 the TCC's proposal that the burden of bringing a motion with regard to a challenged confidentiality
2 designation, and the burden of persuasion with respect to such a motion, should lie with the party
3 making the designation. The Ad Hoc Subrogation Group also objects to the requirement that a person
4 not otherwise specified in the protective order obtain Producing Party consent to gain access by
5 signing the Acknowledgment and Agreement to be Bound. The Ad Hoc Subrogation Group does not
6 object to any other portions of the proposed protective orders at this time, but reserves the right to
7 seek relief before this Court should its concerns concerning over-designation of discovery prove
8 justified.

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12 Dated: June 19, 2019

13 **WILLKIE FARR & GALLAGHER LLP**

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Holders*